

ORIGINAL

BEFORE THE

## Federal Communications Commission

WASHINGTON, D.C. 20554

In re Applications of

MOONBEAM, INC.

GARY E. WILLSON

For a Construction Permit  
New FM Station on Channel 265A  
in Calistoga, California

To: The Honorable Edward Luton  
Administrative Law Judge

MM DOCKET NO. 93-42

File No. BPH-911115MG

File No. BPH-911115MO

RECEIVED

APR 26 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARYOPPOSITION TO MOTION TO ENLARGE

Gary E. Willson (Willson) files this Opposition to Motion to Enlarge Issues filed by Moonbeam, Inc. Moonbeam seeks addition of a site availability issue. Willson has reasonable assurance of its site. The motion, therefore, should be denied.

Mr. Willson proposes to place his antenna on a 30-foot pole on Mount St. Helena. The proposed site is located in an antenna farm with numerous other communications users in the immediate

with Mr. Pringle on numerous occasions before Willson's application was filed in November of 1991. Mr. Willson confirmed his numerous conversations with Mr. Pringle and the availability of the site by letter dated November 15, 1991. See Exs. 1 and 2.

Mr. Pringle gave Mr. Willson reasonable assurance that the site was available before Mr. Willson filed his application and has again confirmed that the site is available now. Mr. Pringle has confirmed in an attached letter declaration that:

1. He is Chief Operations Officer of Diablo Communications, which serves as the authorized agent for Mr. Livermore for the westerly site on Mount St. Helena.
2. As the authorized agent and manager for Mr. Livermore of the westerly site, Mr. Pringle routinely provides reasonable assurance to perspective communications clients.
3. Mr. Pringle spoke to Gary Willson on numerous occasions about use of the site and provided reasonable assurance of the site's availability before the application was filed in November 1991.

any other party for a new FM station on Mount St. Helena. Since that letter, though, Mr. Pringle has again advised Mr. Livermore of Mr. Willson's proposal, and Mr. Livermore has expressed no objection. In fact, Mr. Livermore has confirmed that Diablo Communications is his agent for managing the westerly site.

In sum, Mr. Willson currently has and had reasonable assurance of his proposed site. In adopting the site certification form used in Willson's application, the Commission stated in Processing of FM and TV Broadcast Applications, MM Docket No. 84-750, 50 Fed. Reg. 1936, published May 13, 1985 at ¶ 22:

Commission requirements will be satisfied when an applicant has contacted the property owner or owner's agent and has obtained reasonable assurance that the proposed site will be available for the intended purpose. (Emphasis added.)

The instructions to FCC Form 301 state:

An applicant need not have a binding agreement or absolute assurance of the availability of the transmitter site it proposes to utilize. However, the applicant must be able to show that it has obtained reasonable assurance that the proposed site is available to it. The Commission's requirements will be satisfied where

despite the fact that the owner of the original proposed site stated that,

This exhibit is not intended to state or suggest that a purchase offer or agreement exists, or that the parties have arrived at any agreements regarding the land. This exhibit is for information purposes only and as it may be unilaterally revoked at anytime without notice, no claims of liability may be made on its account.

Id. at 5351.

Similarly in National Innovative Programming Network, Inc. of the East Coast, 2 FCC Rcd. 5641 (1987), the Commission held that an applicant had reasonable assurance of site availability from Fordham University where use of the site was contingent on the ability to negotiate mutually acceptable terms. The Commission noted that all that is required for reasonable assurance is some indication of a favorable disposition to make the property available beyond simply a mere possibility. The Commission went on to note that "this reasonable assurance may be acquired by informal telephone contacts by counsel for the applicant and rent and other details may be negotiated at a yet undetermined future date." Id. at 5643.

Finally, in Mableton Broadcasting Company, Inc., 5 FCC Rcd. 6314 (Rev. Bd. 1990), the Board reversed an ALJ's disqualification of an applicant for its alleged failure to obtain reasonable assurance of its original proposed site. A five-percent limited partner of an applicant obtained a commitment from one of the owners of its intended site that the property would be available for lease. No terms were specified or negotiated. Later, one of the owners indicated he had not agreed to make the site available

and the applicant was unable to obtain reasonable assurance from all the owners of the site. Despite the fact the applicant waited 3 months to amend to a new site after it became apparent

Moonbeam also relies on Port Huron Family Radio, Inc., 4 FCC Rcd. 2532 (Rev. Bd. 1989). The facts in Port Huron are markedly different. There, an applicant assumed the site was available simply by driving by the site and observing that the land was for sale. The applicant admitted he had not obtained reasonable assurance. The Review Board noted the applicant, "had no understanding with, or good faith 'reasonable assurance' from, the land owner (or the owner's agent) of its initial site." Id. at ¶17. The Board further noted, "Here, by its own admissions, L&K never secured reasonable assurance of the site specified in its application." Id. at ¶19. By contract, as confirmed by Mr.

**EXHIBIT 1**

**DECLARATION**

I, Gary Willson, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief:

1. I discussed with Len Pringle on numerous occasions my proposed application for a new FM station in Calistoga, California before my application was filed on November 15, 1991.

2. We discussed the availability of the site specified in my application.

3. Mr. Pringle advised that he needed to obtain approval from the owner of the site, an attorney in San Francisco, before giving me reasonable assurance of the site's availability.

4. Mr. Pringle advised me sometime shortly before my application was filed that he had obtained approval for my proposed use of the site from the owner.

5. Mr. Pringle assured me that I had reasonable assurance of the site proposed in my application, that I could specify the site in my application and that, if my application was granted, we would negotiate lease terms in good faith which we expected would be at the then going market rate.

6. By letter dated November 15, 1991 addressed to Mr. Pringle, I confirmed that I had reasonable assurance of the site.

\_\_\_\_\_  
Date

\_\_\_\_\_  
Gary Willson \*/

\*/ Executed declaration will be filed upon receipt.



# GARY WILLSON COMPANY

BROADCAST CONSULTANTS  
2 CORTE DEL BAYO LARKSPUR, CALIFORNIA 94939  
(415) 924-3588

November 15, 1991

Mr. Leonard J. Pringle  
Diablo Communications Inc.  
1220 Brickyard Cove Rd.  
Suite 200  
Point Richmond, CA 94801

Re: New FM tower and antenna site at north face Mt. St. Helena

Dear Len:

This is to confirm our conversations over the last two or three weeks concerning the use of the north site for a new FM radio station tower, antenna and transmitter on Mt. Saint Helena.

You indicated that you had confirmed with the owner of the site that the site is available to me for my proposed new station to be licensed to Calistoga, California.

Terms will be negotiated at the time my application is granted and will be based on the going market rate. I have enclosed for your records the engineering portion of my application filed with the FCC on November 15, 1991.

Should you have any questions, please contact me directly.

Sincerely,



Gary E. Willson

Enclosure

**EXHIBIT 2**

MEL FREEDMAN

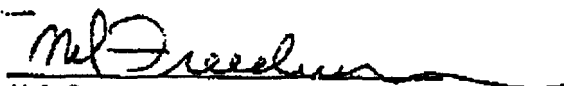
CONSULTING RADIO ENGINEER

DECLARATION

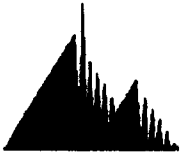
I, Mel Freedman, hereby declare under penalty of perjury that the following is true and correct to the best of my knowledge and belief:

1. I am a Consulting Radio Engineer and prepared the engineering portion of Gary Willson's pending application for a new FM station at Calistoga, California.
2. I cannot recall the date, but I believe at some point approximately one month before Mr. Willson's FM application for Calistoga was filed, I contacted Leonard J. Pringle, Vice President and Chief Operating Officer of Diablo Communications, Inc. I explained to Mr. Pringle that Gary Willson was filing an application for a new FM station at Calistoga, California, and that we wished to locate at their Mt. St. Helena site. I further explained that Mr. Willson would propose to construct a short mast of approximately 30 feet and we discussed the location of the mast.
3. Mr. Pringle explained that Diablo Communications, Inc., was the leasing agent and managed the site and that Mr. Willson's proposal was agreeable to him, but that final approval would have to come from the site owner. I asked that such permission be sought and told Mr. Pringle that Gary Willson would contact him to discuss any further details.
4. Mr. Willson advised me sometime before the application engineering was completed that Mr. Pringle had stated that he had obtained the necessary approval from the site owner, thus providing reasonable assurance that the proposed location was available for Willson's use.

Hughson, California  
20 April 1993

  
Mel Freedman

**EXHIBIT 3**



DIABLO COMMUNICATIONS, INC.

1220 Brickyard Cove Road, Suite 200, Point Richmond, CA 94801 Telephone (510) 236-3700 FAX (510) 236-3799

April 20, 1993

Mr. Gary E. Willson  
2 Corte Del Bayo  
Larkspur, CA 94939

Subject: Site Availability - Saint Helena, CA

Dear Mr. Willson

I would like to apologize for the confusion over the site availability and reasonable assurance for your FM application on Mt Saint Helena, CA. I have contacted Mr. Putnam Livermore, the land owner, and his letter to me is attached for your review.


Diablo Communications, Inc. is the authorized agent for Mr.  
~~Putnam Livermore~~ at ~~Diablo Communications, Inc.~~ located at Mt Saint

The site on which you filed your Class A FM application is still available to you as we previously have discussed. You may construct as specified in your FCC filing. Mr. Livermore is aware that I am providing you this letter.

Thank you for your continued interest in Mt. Saint Helena and Diablo Communications, Inc.

The undersigned states under penalty of perjury that the foregoing is correct to the best of my knowledge and belief.

Very truly yours,

  
Leonard J. Pringle  
Chief Operations Officer

1-Attachment  
LJP/hs

Putnam Livermore  
Attorney at Law  
100 Green St.  
San Francisco, CA 94111

April 20, 1993

Mr. Len Pringle  
Diablo Communications, Inc.  
1220 Brickyard Cove Rd., Suite 200  
Point Richmond, CA 94801-4134

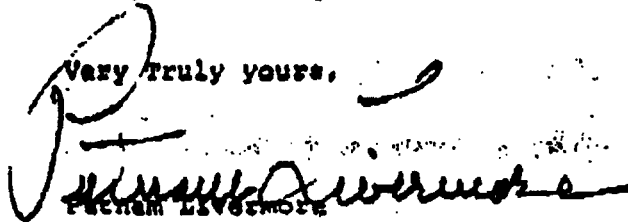
Re: Mount St. Helena FM Application

Dear Mr. Pringle:

You have informed me that in connection with the above site and involving a new FM Application by a Mr. Willson, you and I had discussed the use by Mr. Willson of Mount St. Helena and specifically the addition of a short tower for FM transmission.

I do not recall this conversation, but you and your company, Diablo Communications Inc., are our agents for managing our westerly site.

Very truly yours,



Putnam Livermore

FL:lm

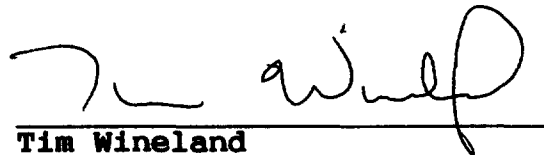
**CERTIFICATE OF SERVICE**

I, Tim Wineland, in the law offices of Gammon & Grange, hereby certify that I have sent, this 26th day of April 1993, by first-class, postage-prepaid, U.S. Mail, copies of the foregoing OPPOSITION TO MOTION TO ENLARGE to the following:

The Honorable Edward Luton  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, N.W.  
Washington, D.C. 20554

Larry Miller, Esq.  
Hearing Branch, Mass Media Bureau  
Federal Communications Commission  
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(Counsel for Moonbeam, Inc.)

  
Tim Wineland